No. 80-827

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ALEXANDER L. STEVAS

In the Supreme Court of the United States

OCTOBER TERM, 1980

ROBERT SCANLON, SECRETARY OF EDUCATION OF THE COMMONWEALTH OF PENNSYLVANIA, PETITIONER

v.

PATRICIA SUE BATTLE, ET AL.

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE 'D CIRCUIT

BRIEF FOR THE UNITED STATES AS AMICUS CURIAE

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QUESTION PRESENTED

Whether a state receiving federal financial assistance under the Education for All Handicapped Children Act properly may decide to provide instruction for mentally handicapped children only during a nine- or ten-month academic year and only for 180 days per year, regardless of the effect those limitations may have on the educational progress of individual children.

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No. 80-827

ROBERT SCANLON, SECRETARY OF EDUCATION OF THE COMMONWEALTH OF PENNSYLVANIA, PETITIONER

v.

PATRICIA SUE BATTLE, ET AL.

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE THIRD CIRCUIT

BRIEF FOR THE UNITED STATES AS AMICUS CURIAE

This brief is submitted in response to the Court's invitation of January 19, 1981.

OPINIONS BELOW

The opinion of the court of appeals (Pet. App. 80a-124a) is reported at 629 F. 2d 269. The opinion of the district court (Pet. App. 1a-54a) is reported at 476 F. Supp. 583.

JURISDICTION

The judgment of the court of appeals (Pet. App. 125a-128a) was entered on July 15, 1980. A petition for rehearing was denied on August 22, 1980 (Pet. App. 129a-130a). The petition for a writ of certiorari was filed on November 20, 1980. The jurisdiction of this Court is invoked under 28 U.S.C 1254(1).

STATEMENT

The Commonwealth of Pennsylvania receives federal financial assistance under the Education for All Handicapped Children Act, 20 U.S.C. (& Supp. III) 1401 *et seq.* As a statutorily-required condition of receiving such funds, the State has undertaken to provide a "free appropriate public education" for all handicapped children between the ages of three and 21. 20 U.S.C. 1412(1), (2)(B). A Pennsylvania statute requires that "[a]ll public kindergartens, elementary and secondary schools shall be kept open each school year for at least one hundred eighty (180) days of instruction for pupils." Pa. Stat. Ann. tit. 15, § 1501 (Purdon 1962). As a matter of administrative policy, petitioner, the Pennsylvania Secretary of Education, has decided that the statutory minimum of 180 days of instruction per nine- or ten-month school year will also be the maximum amount of instruction available annually to any student in the Pennsylvania public school system (Pet. App. 7a).

Respondents are five mentally handicapped children and their parents. In January 1978, two of the children, Gary Armstrong and Richard H., and their parents filed a class action in the United States District Court for the Eastern District of Pennsylvania, challenging petitioner's 180-day rule (A. 113a-126a).[1] They alleged that, because of the nature and severity of the children's handicaps, limitation of their annual instruction to 180 days would seriously retard their educational progress. They asserted that the 180-day rule violates the Education for All Handicapped Children Act, Section 504 of the Rehabilitation Act of 1973 (29 U.S.C. 794), the Equal Protection and Due Process Clauses of the Fourteenth Amendment, and Pennsylvania state law. They sought declaratory and injunctive relief, including an order directing petitioner to "provide to the named minor plaintiffs a 12-month per year program of

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[1] "A." refers to petitioner's appendix in the court of appeals.

free, appropriate special education and related services" (A. 126a). A third minor respondent, Mark Anderson, and his mother joined the lawsuit as named plaintiffs through an amendment to the complaint in February 1978 (*id.* at 130a-132a).

The remaining two handicapped respondents, Patricia Sue Battle and Natalie Bernard, and their parents filed separate class actions in the same district court in March 1978 (A. 19a-38a, 70a-90a). The allegations and prayers for relief in the Battle and Bernard complaints were very similar to each other and were similar also to those contained in the Armstrong complaint. In addition to declaratory and injunctive relief, the parents of Patricia Sue Battle and Natalie Bernard sought damages in the amount of $50,000 each (*id.* at 38a, 89a).

The three class actions were consolidated for trial on their common declaratory and injunctive issues (Pet. App. 3a). The district court certified a single plaintiff class including "[a]ll handicapped school aged persons in the Commonwealth of Pennsylvania who require or who may require a program of special education and related services in excess of 180 days per year and the parents or guardians of such persons" (*id.* at 5a).

The district court found that the five named handicapped respondents are all either "severely and profoundly impaired" (SPI) or "severely emotionally disturbed" (SED) (Pet. App. 4a).[2] The court also found, on the basis of expert testimony, that educators of such children commonly view their goal as "the attainment of * * * the highest level of self-sufficiency that the child can achieve" (*id.* at 15a). At the very least, the court found, "the educator's goal is to

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[2] The court's explanation of these phrases as they are used by professionals in the diagnosis and treatment of mentally handicapped persons and as they apply to the five handicapped children may be found at Pet. App. 9a-15a. See also 45 C.F.R. 121a.5.

provide skills that keep the child mobile and at home for as long as possible, for these two factors contribute to increasing life expectancy" (*id.* at 16a).

The district court next considered the effects of substantial breaks in educational programming on the progress of children with severe mental handicaps. Because petitioner's 180-day rule apparently entails a nine- or ten-month school year, adherence to that administrative standard normally results in a two-or three-month break each year in the free public education offered to students in Pennsylvania. In addition, the 180-day rule mandates a series of other, shorter breaks in instruction during the school year. The district court found that "some SPI and SED children significantly regress during breaks in programming, and that they do so to a greater extent than normal children" (Pet. App. 30a). Moreover, the court found that "just as normal children regress less than SPI and SED children do during breaks, they recoup their losses at a faster rate than these handicapped children" (*id.* at 31a). The court concluded (*id.* at 32a) that

> for some SPI and SED children, including the named [handicapped respondents], interruptions in programming, because of regression and the length of time it takes to regain lost skills and behaviors, render it impossible or unlikely that they will attain that state of self-sufficiency that they could otherwise reasonably be expected to reach.

Accordingly, the court ruled that petitioner's 180-day rule precludes the handicapped respondents and others similarly situated "from receiving an education that is likely to allow them to reach their reasonably set educational goals with respect to self-sufficiency" (*id.* at 38a).

Turning to the Education for All Handicapped Children Act, the district court determined that one congressional purpose underlying the statute's enactment in 1975 was "to

allow handicapped children to achieve at a minimum * * * self sufficiency and independence from caretakers" (Pet. App. 46a). Relying on the statutory focus on the "unique needs" of each individual handicapped child and on the legislative history of the Act, the court concluded that Congress intended "to provide for that education which would leave these children, upon school's completion, as independent as possible from dependency on others, including the state, within the limits of the handicapped condition" (*id.* at 48a). On this basis, the court held that petitioner's 180-day rule violates the Act's requirement that a "free appropriate public education" be provided to all handicapped children. In the court's view, inflexible application of the 180-day rule would prevent at least some mentally handicapped students from attaining the level of self-sufficiency that would be possible with more continuous instruction (*id.* at 49a).

The district court ordered petitioner to provide an "appropriate educational program in excess of 180 days" to respondents Gary Armstrong, Richard H., Mark Anderson, and Natalie Bernard (Pet. App. 53a).[3] The court further ordered petitioner not to refuse to provide a program of special education and related services in excess of 180 days per year to any handicapped child who is a member of the certified class (*id.* at 53a-54a). The court sought the assistance of the parties in formulating more specifically the appropriate class-wide injunctive relief and in determining the precise nature of the educational program that should be provided for the named handicapped respondents.

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[3]Respondent Patricia Sue Battle had turned 21 during the district court litigation and therefore was no longer eligible for a publicly supported education under the Act (Pet. App. 2a, 50a).

At a later date, after receiving the recommendations of the parties, the court ordered petitioner and the relevant local school districts to provide a year-round seven day per week program of special education and related services for respondents Richard H., Mark Anderson, and Natalie Bernard (Pet. App. 55a-58a). The court also directed that respondent Gary Armstrong be placed in an appropriate summer special education program for five hours per day, three days per week, during a six-week period in July and August 1979 (*id.* at 56a).

In August 1979, the district court entered a further order styled "Remedial Order No. 1" (Pet. App. 59a-62a). This order identified a group of class members whose situation was to be reviewed by petitioner on a priority basis as part of the implementation of the district court's earlier opinion. Included within the priority class were those students who had been placed by public authorities in "day or residential education programs operating on a year round basis without admitting * * * children for a lesser period of time and whose parents or guardians are presently paying for programming in excess of 180 days" (*id.* at 60a). The district court ordered petitioner promptly to notify the parents or guardians of these handicapped children of the court's decision and, in light of the court's ruling, to review the individualized education program previously established for each such child under the Act. See 20 U.S.C. 1414(a)(5). With respect to those priority class members found during this review to require more than 180 days of instruction per year, the court directed petitioner to reimburse their parents or guardians "for any expenses incurred in maintaining their children in their special education placements since the date of this Order" (Pet. App. 61a). With respect to those priority class members found not to require more than 180 days of instruction per year, the court directed petitioner to advise their parents or guardians of their right to a prompt due process hearing to challenge the administrative decision (*id.* at 61a-62a).

Finally, in September 1979, the district court entered its "Remedial Order No. 2" (Pet. App. 63a-67a). This order specified the dates by which petitioner was required to provide notice of the court's decision to the parents or guardians of non-priority class members and to advise them of their right to request review of the children's individualized education programs in light of the court's ruling. The remedial order also required petitioner to submit to the court and to counsel for respondents progress reports concerning the implementation of the court's decision and a proposed monitoring plan for ensuring future compliance. In addition, in Remedial Order No. 2, the district court described in greater detail the kind of handicapped student who, in the court's view, is entitled under the Act to instruction for more than 180 days per year. The court stated (*id.* at 64a, 70a):

> A handicapped student is entitled to an education program in excess of 180 days per year if regression caused by an interruption in educational programming, together with the student's limited recoupment capacity, renders it impossible or unlikely that the student will attain the level of self-sufficiency and independence from caretakers that the student would otherwise be expected to reach in view of his/her handicapped condition.

On petitioner's appeal,[4] the court of appeals agreed that the 180-day rule is inconsistent with the Education for All Handicapped Children Act, but it rejected the reasoning by

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[4]Jurisdiction in the court of appeals was based on 28 U.S.C. 1292(a)(1), which authorizes interlocutory appeals from grants of injunctive relief. The court of appeals noted that the district court has not yet addressed respondents' contentions under the Constitution or statutes other than the Education for All Handicapped Children Act and also has not ruled on the claims for damages in the Bernard and Battle actions (Pet. App. 87a-88a).

which the district court reached that conclusion. The court of appeals began by observing that the facts found by the district court were not disputed on appeal (Pet. App. 91a). Accordingly, the court accepted the proposition that, because of the unusual severity of their regression problem and their special difficulty in recouping lost skills, SPI and SED children are particularly likely to suffer serious educational setbacks as a result of interruptions in their programs of instruction (*id.* at 96a).[5]

The court of appeals differed with the district court, however, on the question of the educational goals contemplated by the Act. The court rejected the district court's conclusion that Congress intended to require states receiving federal funds under the Act to provide "that education which would leave these children, upon school's completion, as independent as possible from dependency on others" (Pet. App. 48a, 97a). The court of appeals held instead that the Act itself does not mandate any particular educational goals but relies in the first instance on State and local authorities to establish appropriate educational goals and to determine the best methods of achieving them (*id.* at 98a-106a).

Nevertheless, the court of appeals ruled that the 180-day rule violates the Act, because it improperly restricts the

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[5]Indeed, in his concurring opinion, Judge Van Dusen proposed an explicit refinement of the description of those handicapped persons who assert in this litigation that petitioner's 180-day rule, as applied to them, is inconsistent with the Act (Pet. App. 112a-113a). In Judge Van Dusen's view, the handicapped respondents are properly characterized as

> those school age individuals who are severely emotionally disturbed or severely and profoundly impaired and whose regression-recoupment syndrome is so severe that the traditional summer vacation period occasioned by the 180-day policy brings their overall progress for the year to a virtual standstill.

State in setting reasonable educational objectives and reasonable means to achieve those objectives. The court stressed the statutory requirements that the content of a "free appropriate public education" be determined by reference to the "unique needs" of each handicapped child and that an "individualized education program" be prepared for each child and periodically reviewed to ensure its continuing suitability (Pet. App. 107a). The court also emphasized the procedural safeguards incorporated into the Act to guarantee the parents and guardians of handicapped children a means of challenging the program adopted for particular children and of obtaining judicial review, if necessary, to evaluate the content of individual education programs. See 20 U.S.C. 1415. In the court's view, Pennsylvania's rigid 180-day rule is antithetical to the clear and pervasive statutory design of tailoring "the contours of the free appropriate public education" to the specific situation of each handicapped child (Pet. App. 107a). The court summarized its holding in the following paragraph (*id.* at 108a):

> We believe the inflexibility of the defendants' policy of refusing to provide more than 180 days of education to be incompatible with the Act's emphasis on the individual. Rather than ascertaining the reasonable educational needs of each child in light of reasonable educational goals, and establishing a reasonable program to attain those goals, the 180 day rule imposes with rigid certainty a program restriction which may be wholly inappropriate to the child's educational objectives. This, the Act will not permit.

Because the court of appeals' reasoning differed substantially from the district court's and because the court of appeals believed that the district court would be better suited in the first instance to consider, on motion of the parties, whether modification of the previously-entered

remedial orders is required by the decision on appeal, the court of appeals remanded the case for further proceedings consistent with its opinion (Pet. App. 110a).[6] Petitioner moved to vacate all of the district court's remedial orders (*id.* at 133a). The district court denied the motion, because it found that, wholly apart from this litigation, Pennsylvania had already adopted an educational policy "equivalent to that utilized in the Court's June 21, 1979 decision and subsequent remedial orders" (*id.* at 136a). In particular, the court relied on 22 Pa. Code § 13.2, a state regulation that Pennsylvania had incorporated by reference in each of the annual program plans submitted by the State to the federal Commissioner of Education under the Act. Section 13.2 explains that the state's policy goal is "to provide exceptional school-aged persons with quality special education programs and services which will ultimately enable them to participate as fully as possible in appropriate activities of daily living" (Pet. App. 137a). Finding no significant difference between this formulation and the educational goal of teaching handicapped persons to be " 'as independent as possible from dependency on others' " (*i.e.*, the goal derived from the Act by the district court in its initial opinion), the district court declined to disturb its remedial orders (*id.* at 137a, 139a).

Petitioner's appeal from this decision is now pending in the Third Circuit (No. 80-2843). On February 5, 1981, the court of appeals granted petitioner an extension of time

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[6]Judge Sloviter concurred in part and dissented in part. She agreed that the 180-day rule is inconsistent with the Act but thought that the majority wrongly refused to elucidate the principal goal of the statute and thus to provide "a uniformly applicable interpretation of the nationally prescribed goal of a 'free appropriate education' " (Pet. App. 119a). In Judge Sloviter's view, "Congress intended that the special education mandated by the statute should be directed to the achievement of self-sufficiency by the handicapped child to the extent possible within the reasonable limits of resource allocation" (*id.* at 122a). She would have affirmed the holding of the district court.

within which to file his brief on appeal. The extension runs until 30 days after this Court's final disposition of the present petition.

DISCUSSION

Review is not warranted at this time. Because of petitioner's pending appeal in the Third Circuit, there is substantial uncertainty concerning the practical effects of the decision below. The court of appeals departed considerably from the rationale of the district court's initial opinion and apparently anticipated that its ruling would have some significant impact on the nature of the remedies to be awarded to the respondent class. Although the court of appeals left the district court's remedial orders intact for the remand period, it is by no means certain that those orders will survive renewed scrutiny by the court of appeals on petitioner's current appeal. Moreover, because the district court's decision on remand turns entirely on Pennsylvania's own formulation of its educational goals for handicapped children, the continued vitality of the court's remedial orders is a matter that may very well be subject to change in the event Pennsylvania modifies the educational policy described in the State's own regulations (see Pet. App. 137a-138a). In addition, the court of appeals' second decision may clarify the extent to which Pennsylvania's obligations to handicapped children arise from state, rather than federal, law. Under these circumstances, intervention by this Court would be premature, even if the validity of petitioner's 180-day rule were an issue that otherwise would merit the Court's attention.

Moreover, the court of appeals' decision is quite narrow and does not conflict with any previous ruling of this Court or other federal courts. The decision does not require petitioner to provide more than 180 days of instruction per year for any individual handicapped child nor does it specify any educational goals that petitioner must pursue in the training

of handicapped children. On the contrary, the court explicitly held that under the Education for All Handicapped Children Act, "the determination of appropriate educational goals, as well as the method of best achieving those goals, are matters which are to be established in the first instance by the states" (Pet. App. 104a). The Act itself specifies that the individualized education program required for each handicapped child should be prepared by the relevant state or local educational authority (20 U.S.C. 1414(a)(5)), and the only practical consequence of the court of appeals' decision is that, in formulating such individualized programs, the school district or other appropriate educational unit may adopt a program entailing more than 180 days of instruction per year, if such an alternative appears essential to the educational progress of a particular handicapped child. Thus, under the court of appeals' decision, state or local authorities will retain the primary responsibility for determining the content and duration of educational programs for the handicapped, but they will exercise that responsibility free of the artificial constraint of the 180-day rule, which restricts the amount of instruction that may be provided for any particular handicapped child without regard for his or her individual situation.

As it currently stands, the record does not reveal how many individualized education programs under the Act are likely to be affected by the court of appeals' ruling. If local school districts conclude in the vast majority of cases that an appropriate individualized education program can be devised that does not entail more than 180 days of instruction per year (and those decisions are sustained in any administrative or judicial review that may be sought under 20 U.S.C. 1415 by the parents or guardians of the individual children involved), the practical effect of the decision below on petitioner will be minimal. Decisions regarding the amount of annual instruction appropriate for particular children will be made on a case-by-case basis, but they will

not necessarily result in substantial increased expenditures for the State. In short, because of the narrow and essentially preliminary nature of the court of apeals' ruling and because little or no evidence has been adduced in the record concerning the number of handicapped children for whom extended periods of instruction are likely to be recommended after an individualized educational review, the impact of the decision below cannot be evaluated accurately at this time. Petitioner can fully present his contentions to this Court in an application for review of the judgment in the appeal in this case now pending in the Third Circuit or in a petition for review of some subsequent judicial ruling on the appropriate content of a particular individualized education program prepared under the Act. In either event, experience in the interim will provide helpful guidance regarding the practical significance of invalidation of the 180-day rule.

To our knowledge, the court of appeals in the present case is the first circuit court to pass on the compatibility of a rigid administrative policy, like the 180-day rule, and the statutory focus in the Education for All Handicapped Children Act on the "unique needs" of each handicapped child. Several other federal district courts have addressed similar questions, however, and each has concluded that inflexible limitations on the amount of annual instruction available to handicapped children are inconsistent with the requirements of the Act. See *Georgia Association of Retarded Citizens* v. *McDaniel*, Civ. No. 78-1950A (N.D. Ga. Apr. 2, 1981); *Anderson* v. *Thompson*, 495 F. Supp. 1256 (E.D. Wis. 1980). See also *In re Richard K.*, [1979-1980 Decisions] Educ. for the Handicapped L. Rep. (CRR) 551:192 (Hooksett Dist. Ct. N.H. June 8, 1979). Accordingly, there is no disagreement among the federal courts that requires resolution in this forum.

The Act defines the phrase "free appropriate public education" to mean (20 U.S.C. 1401(18))

> special education and related services which (A) have been provided at public expense, under public supervision and direction, and without charge, (B) meet the standards of the State educational agency, (C) include an appropriate preschool, elementary, or secondary school education in the State involved, and (D) are provided in conformity with the individualized education program required under section 1414(a)(5) of this title.

"Special education," in turn, means (20 U.S.C. 1401(16))

> specially designed instruction, at no cost to parents or guardians, to meet the unique needs of a handicapped child, including classroom instruction, instruction in physical education, home instruction, and instruction in hospitals and institutions.

And, "individualized education program" means (20 U.S.C. 1401(19)) a written statement for each handicapped child describing the specific educational services to be provided to the child to meet his or her unique needs.

At least for those handicapped children for whom it can be demonstrated that the combination of their regression-recoupment problem and petitioner's 180-day rule will result in no educational progress whatever, there is a plausible argument that application of the rule is not consistent with the Act. Indeed, petitioner himself concedes (Pet. 17) that "[i]t may * * * be improper to provide only a program from which a child can derive no benefit." Yet, if and to the extent that the respondent class includes children like those described in Judge Van Dusen's concurring opinion (Pet. App. 112a-113a)—"those school age individuals who are severely emotionally disturbed or severely and profoundly impaired and whose regression-recoupment syndrome is so

severe that the traditional summer vacation period occasioned by the 180-day policy brings their overall progress for the year to a virtual standstill"—acceptance of petitioner's position would have precisely that effect. It cannot readily be concluded that in the Education for All Handicapped Children Act Congress intended to provide funding for an educational effort that would entail significant expenditures of time and money but would produce no positive educational results.

Petitioner expresses much concern about the financial consequences of the court of appeals' ruling (Pet. 14-15). There are two answers to this line of argument. In the first place, as we have already discussed, the present record provides no basis for estimating reliably the extent of the decision's impact on state and federal resources. Second, and more important, the court of appeals' holding imposes no absolute obligation on Pennsylvania or any other state to expend scarce resources. On the contrary, Pennsylvania's obligations under the Act arise only as a by-product of the State's decision to accept the federal funds made available by the statute. If Pennsylvania finds that the burdens imposed by the Act are excessively onerous in comparison with the benefits derived by the State from federal financial assistance, it is free to withdraw from participation in the statutory program. The limited information available, however, suggests that this will not be the State's conclusion. Indeed, respondents assert (Br. in Opp. 14 n.7) that data submitted to the district court by petitioner shortly before the court of appeals' decision show that "fewer than 2,100 handicapped youngsters had been identified as in need of and eligible for extended school year programming" and that "[a]ll costs of providing extended programming for those youngsters were paid with excess federal funds" distributed under the Act. Although we cannot verify the accuracy of this representation, the Department of Education has advised us that Pennsylvania's allotment under the

Act for the current fiscal year is approximately $40,000,000. It appears, therefore, that at least a substantial portion of whatever additional expense may be mandated by the court of appeals' decision will be defrayed by federal, rather than state, funds. And, in any event, as the district court stated in *Mills* v. *Board of Education of the District of Columbia*, 348 F. Supp. 866 (D.D.C. Cir. 1972), a decision cited with approval in the legislative history of the Act (see S. Rep. No. 94-168, 94th Cong., 1st Sess. 23 (1975)), "[i]f sufficient funds are not available to finance all of the services and programs that are needed and desirable in the system then the available funds must be expended equitably in such a manner that no child is entirely excluded from a publicly supported education consistent with his needs and ability to benefit therefrom." There is nothing in the petition, the record, or the opinions below, that suggests that petitioner has attempted "equitably" to apportion a scarcity of funds among the school children of Pennsylvania to ensure that every child derives some benefit from his or her educational program. Indeed, at the present stage of the case, petitioner simply has not proven the insufficiency of resources he asserts in this Court.[7]

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[7]Legislative proposals recently submitted to Congress by the Executive Branch may make it unnecessary for this Court ever to construe the Education for All Handicapped Children Act in its current form. Identical bills now pending in both houses of Congress (S. 1103, introduced by Senator Hatch (127 Cong. Rec. S4329 (daily ed. May 4, 1981)), and H.R. 3645, introduced by Representative Erlenborn (127 Cong. Rec. H2385 (daily ed. May 20, 1981)) would repeal those provisions of the Act that impose on recipients of federal funds the obligations controverted in this case. See, in particular, Section 313(b) of the Elementary and Secondary Education Consolidation Act of 1981, as proposed in each of the bills cited in the preceding sentence.

CONCLUSION

The petition for a writ of certiorari should be denied.

Respectfully submitted.

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